Supreme Court, U.S.
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No. 01-723

In The

Supreme Court of the United States

PENOBSCOT NATION; PASSAMAQUODDY TRIBE; BARRY L. DANA, in his capacity as Chief of the Penobscot Nation; RICHARD M. DOYLE, in his capacity as Governor of the Passamaquoddy Tribe; and RICHARD STEVENS, in his capacity as Governor of the Passamaquoddy Tribe,

Petitioners,

v.

GEORGIA-PACIFIC CORPORATION; GREAT NORTHERN PAPER, INC.; INTERNATIONAL PAPER COMPANY; and the STATE OF MAINE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF

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REPLY BRIEF

Respondents' Brief in Opposition is a work of obfuscation. The First Circuit's action below puts it in direct conflict with other circuits and marks a significant departure from the usual course of judicial proceedings.

1. In an attempt to avoid the equitable basis for the application of *Munsingwear* and its progeny here – the Tribes' inability to attain appellate review of the district court's "well-pleaded complaint rule" decisions in *Penobscot I* and *Penobscot II* by the happenstance of the Maine Supreme Judicial Court's winning the "race" to judgment – Respondents make the unfounded assertion that the First Circuit affirmed those decisions on the "alternate" ground of *res judicata*. They gloss right over the fortuity of the intervening event depriving the Tribes of appellate review by suggesting that *res judicata* was "in front of" the district court. *See Respondents' Brief in Opposition* ("*Opp.*") at 9, 12 n.4, 13. It was not. The issue of *res judicata* is nowhere to be seen in the decisions of the district court or in any of the briefs filed there. *See Petition Appendix* ("*Pet. App.*") at 16-38 (decisions); *First Circuit Docket 00-2265*, Record Items 5, 16, 26, 29, 30, 32 (briefs). In the First Circuit, the *res judicata* consequence of the Maine SJC's decision was a fortuity that eliminated the need to entertain the Tribes' appeal. That "intervening decision," the First Circuit said, rendered the Tribes' "federal suit superfluous" and thereby eliminated any need to review the "difficult" questions presented by the Tribes' appeal. *Id.* at 5, 12, 15.

This is the classic setting for application of this Court's equitable rule of vacatur. It should be applied to

prevent the district court's "well-pleaded complaint rule" decisions in *Penobscot I* and *Penobscot II*, "unreviewable because of mootness, from spawning any legal consequences." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950). *Accord U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 & n.3 (1994). The First Circuit's failure to apply the rule departs from "the accepted and usual course of judicial proceedings" and, therefore, warrants a grant with summary disposition under this Court's supervisory power. *See* SUP. CT. R. 10(a). That has been the standard practice in this Court in myriad cases presenting this problem. *See generally* 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.10 n.11 (2d ed. 1984 & Supp. 2001) (citing 30 cases).

2. Contrary to Respondents' view, the First Circuit's rejection of the Court's vacatur rule in the circumstances presented splits it off from other circuits and warrants the writ of *certiorari* if the Court does not summarily grant the writ and issue a vacatur order.

The First Circuit has interpreted this Court's vacatur rule to require more than just mootness of the issue presented on appeal due to underlying mootness of a federal case. The First Circuit requires mootness of the parties' controversy in other forums. *See Pet. App.* at 41 (rejecting vacatur because "the controversy continues . . . to be litigated in state court"). In other circuits, mootness of the issue presented on appeal and the parties' federal case is enough to invoke the rule. As described in the Petition, that is what occurred in *Blue Cross & Blue Shield of Alabama v. Nielsen*, 142 F.3d 1375 (11th Cir. 1998) and *Potomac Greens Associates v. City*

Council, 6 F.3d 173 (4th Cir. 1993). That is also what occurred in *Exxon Corp. v. Heinze*, 32 F.3d 1399 (9th Cir. 1994), where the parties continued their controversy in a state court and the Ninth Circuit vacated district court decisions independent of (but related to) that controversy, which were mooted by a partial settlement. *See id.* at 1403, 1405.

Respondents attempt to align the First Circuit with the Eleventh Circuit in *Blue Cross* and the Fourth Circuit in *Potomac Greens* by arguing, in a footnote, that "the issue on appeal to the First Circuit on the well-pleaded complaint grounds was not eliminated by the Maine SJC's decision. . . . The SJC decision *added* a ground for the First Circuit to review, as opposed to *eliminating* the need for review, as in [*Blue Cross* and *Potomac Greens*]." *Opp.* at 12 n.4 (emphasis in original).

Obviously, this is not how the First Circuit reasoned.

According to the First Circuit, the *res judicata* effect of the Maine SJC's "intervening" decision *eliminated* the need for review. Since that decision rendered the Tribes' federal case moot, the First Circuit simply would not "decide *in advance of necessity*" the Tribes' appeal of *Penobscot I* and *Penobscot II*. *Pet. App.* at 11 (emphasis added).[1] In other words, the First Circuit did not entertain the Tribes' appeal at all. Rather, its disposition was a

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[1] The First Circuit most certainly decided that the happenstance of the Maine SJC's "race" to judgment eliminated *the necessity* of examining *Penobscot I* and *Penobscot II*. That happenstance, under the First Circuit's reasoning, gave it an "out" by undermining the justiciability of the Tribes' federal case under principles of *res judicata*. *See Pet. App.* at 14-15. Had that not occurred, the First Circuit would have had a duty to

de facto dismissal of their appeal on the ground that *their federal case* became nonjusticiable (or "moot") with the advent of the Maine SJC's decision. In other circuits, when appellate review is lost in a manner such as this, vacatur is required. *See, e.g., Blue Cross,* 142 F.3d at 1376-77; *National Black Police Ass'n v. District of Columbia,* 108 F.3d 346, 354 (D.C. Cir. 1997); *Jones v. Temmer,* 57 F.3d 921, 923 (10th Cir. 1995); *Exxon Corp. v. Heinze,* 32 F.3d at 1405; *Potomac Greens Associates,* 6 F.3d at 177.

3. This leads to the relief the Tribes seek from this Court. Respondents incorrectly state that the Tribes ask this Court "to expunge some or all of the First Circuit's decision." *Respondents Brief in Opposition* at 14. They do not. *See Petition.*

Under the *Munsingwear* doctrine, as applied in other circuits, the elimination of the Article III case or controversy in federal court brought about by the happenstance of the Maine SJC's intervening decision would warrant *dismissal* of the Tribes' appeal, an order *vacating* the unreviewed decisions that the Tribes sought to appeal, and a remand order to dismiss the federal case as moot (for want of a justiciable case or controversy). *See, e.g., National Black Police Ass'n,* 108 F.3d at 354 (appeal moot when legislature amended state law that was the subject

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address the sole question adjudicated in *Penobscot I* and *Penobscot II*: whether the Tribes' case "arose under" federal law for the purposes of 28 U.S.C. § 1362 and 28 U.S.C. § 1331. *See Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94 (1998) (courts are required to address questions of subject matter jurisdiction). *See also Pet. App.* at 14-15 (discussing *Steel Co.*).

of constitutional challenge in federal court); *Jones v. Temmer*, 57 F.3d at 923 (same). *See also Penguin Books USA Inc. v. Walsh*, 929 F.2d 69, 73-74 (2nd Cir. 1991) (same result when unilateral action of appellee moots appeal).

This is what the Tribes seek here. They do not ask this Court to selectively expunge parts of the First Circuit decision. They simply ask this Court to (1) vacate the First Circuit's judgment affirming the district court and (2) remand the case to the First Circuit with instructions to vacate the rulings of the district court in *Penobscot I* and *Penobscot II*. *See Petition* at 23, 29. Certainly, under the First Circuit's *res judicata* rationale, which the Tribes do not challenge in their Petition, the Tribes' appeal of *Penobscot I* and *Penobscot II* became moot when the intervening Maine SJC decision "foreclose[d]" the relief they sought in the district court. *See Pet. App.* at 15. Thus, the First Circuit's decision would stand as the basis for dismissing the Tribes' appeal and remanding the case to the district court for dismissal for want of a justiciable case. (And this Court can so specify on remand.) What cannot stand under *Munsingwear* and its progeny, however, is a First Circuit judgment that leaves intact the district court's unreviewed rulings in *Penobscot I* and *Penobscot II*, holding that the Tribes are barred from proceeding to federal court under the "well-pleaded complaint rule."[2]

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[2] As the Tribes pointed out in the Petition, this issue is no small matter. They sought to invoke the federal court's jurisdiction pursuant to, *inter alia*, 28 U.S.C. § 1362, which Congress enacted for the express purpose of giving Indian tribes a federal forum, *in preference to a state forum*, for resolving controversies concerning their rights of self-government. *See Petition* at 26 (citing cases). By winning their concerted "race" to

Under this Court's equitable rule of vacatur, the Tribes must have a clear path to litigate that issue in the future. *See U.S. Bancorp*, 513 U.S. at 25; *Munsingwear*, 340 U.S. at 40-41.[3]

For all of the above reasons, as well as those set forth in the Petition, the Court should grant the writ of *certiorari*, summarily vacate the First Circuit's judgment, and remand the case to the First Circuit with instructions to vacate *Penobscot I* and *Penobscot II*, or, in the alternative, grant the writ and proceed in the ordinary course.

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a state court judgment, Respondents successfully precluded appellate disposition of the Tribes' right to invoke the jurisdiction of the federal court in such a controversy. *See Petition* at 10-11, 22. Not only has the "happenstance" of the state court's race to judgment deprived the Tribes of appellate review, but efforts by the Respondents pushed the eventuality of that happenstance. *See id.* Respondents would now block a "clear path" for the Tribes to litigate their access to federal court notwithstanding their loss of appellate review. The equities are clear.

[3] The Respondents' cryptic argument that application of this Court's vacatur rule should turn on whether a particular decision is preclusive or not is unsupported. They cite no case that stands for such a proposition, and existing authority is to the contrary. In *Jones v. Temmer*, 57 F.3d 921, for instance, the Tenth Circuit rejected "out of hand" an assertion that the government's interest in "having the lower court opinion available as precedent" is a factor for consideration in the application of this Court's vacatur rule. *Id.* at 923 n.1.

Respectfully submitted,

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